No. 18635

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT AGOBIAN and ALBERT EGISHIAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

JURISDICTION AND STATEMENT OF THE CASE.

On April 18, 1962, the Appellants Albert Agobian and Albert Egishian were indicted by a Federal Grand Jury for the Southern District of California, in a single count which charged that on or about March 28, 1962, the appellants knowingly and unlawfully received, concealed and facilitated the concealment and transportation of a certain quantity of illegally imported heroin in violation of Title 21, United States Code, Section 174. [C. T. 2.]*

On motion of the appellants the case was transferred to the Southern Division of the Southern District of California for trial and all further proceedings. [C. T. 7-8.]

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*C. T. refers to Clerk's Transcript.

On September 20, 1962, the appellants were convicted in the United States District Court for the Southern District of California, the Honorable Wm. C. Mathes presiding, upon a jury verdict of guilty.

On October 5, 1962, each appellant moved for a new trial and both motions were denied. [C. T. 27.]

Appellants were each sentenced to imprisonment for ten years on October 5, 1962; and on October 12, 1962, each appellant gave notice of appeal. [C. T. 28-31.]

The jurisdiction of the District Court was predicated on Title 18, United States Code, Section 3231, and this Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II.
STATUTE INVOLVED.

Title 21, United States Code, Section 174, provides in pertinent part:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drugs after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition may be fined not more than $20,000.
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III.
STATEMENT OF FACTS.

On the evening of March 26, 1962, the appellants, Albert Agobian and Albert Egishian first approached Mr. Ronald Rojas with a "business proposition." [R. T. 26.]* Unknown to the appellants, Mr. Rojas was a special employee of the Government. [R. T. 61, 66, 103.] The appellants explained that they possessed a supply of heroin but Mr. Agobian's former "salesman" had been arrested. [R. T. 29-30.] Mr. Rojas agreed to sell heroin on behalf of the appellants. Since the appellants current supply of heroin would have to be "cut" or diluted in order to be marketable, arrangements were made to meet the following evening. [R. T. 52.]

At approximately 8:00 P.M., on March 27, 1962, the appellants picked up Mr. Rojas and drove to the residence of the appellant, Albert Egishian. [R. T. 31.] Upon arrival, the appellant Albert Agobian produced a quantity of heroin in a rubber container, and, the appellant Albert Egishian supplied the milk sugar with which to "cut" or dilute the heroin. [R. T. 31.] The heroin was placed in a glass jar with an equal amount of milk sugar. After "cutting," there was approximately one ounce of heroin. [R. T. 32.]

The appellants stated that they would deliver the heroin to Mr. Rojas on March 28, 1962. [R. T. 33.] When last seen by Mr. Rojas, the heroin was contained in a glass jar with a metal lid. [R. T. 32.]

At approximately 6:00 P.M., on March 28, 1962, the appellants picked up Mr. Rojas at Worth's Clothing

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*R. T. refers to Reporter's Transcript.

Store. The appellants drove Mr. Rojas to his residence on Madison Avenue in Los Angeles. The appellants stated that they would return immediately with the heroin. [R. T. 34-35, 54-55, 76-77.]

At 6:30 P.M., on March 28, 1962, agents of the Federal Bureau of Narcotics and officers of the Sheriff's Department, Narcotic Detail, were stationed in the area of Mr. Rojas' residence on Madison Avenue. They observed a 1941 Cadillac, powder blue in color, drive down Madison Avenue and enter the alley adjoining Mr. Rojas' residence. The appellant Albert Egishian was driving and the appellant Albert Agobian was a passenger. There were no other occupants in the vehicle. [R. T. 55, 77-78.] After the vehicle had stopped in the alley, Deputy Sheriff Weldon went to the passenger side of the car. He observed that the appellant Albert Agobian was looking directly at Deputy Sheriff Weldon. In a loud voice, Deputy Sheriff Weldon called "Sheriff's Department, open the door," while displaying his badge in his left hand. [R. T. 56, 63.] Deputy Henry stood at the driver's door and shouted, "Sheriff, freeze." [R. T. 106.]

After the officers had identified themselves, the appellants attempted to escape. At a high rate of speed, the appellants drove in reverse out of the alley. In the process, the appellants' vehicle struck and knocked down Deputy Sheriff Weldon. [R. T. 56.] After exiting from the alley, the appellants drove east on Madison Avenue in reverse, at a speed of 25 to 30 miles an hour, in an erratic manner. [R. T. 56-57.]

During the attempted escape, Deputy Sheriff Stoops observed an object being thrown from the passenger window of the appellants' vehicle. This occurred on

Madison Avenue at a location approximately 20 feet east of the alley. [R. T. 79.] It was also while the appellants' vehicle was at this location that Deputy Sheriff Velasquez heard the shattering of glass. [R. T. 167.] Thereafter, the officers observed a trail of powder and broken glass commencing on Madison Avenue 20 feet east of the alley, and terminating at the street curb. [R. T. 81, 151.] A metal jar lid containing a powdery substance was recovered at the curb. [R. T. 81, 139, 142, 152, 183.] The powder gathered from the asphalt pavement and the powder found in the metal jar lid were analyzed and found to be heroin. [R. T. 16, 144, 145.]

Both on foot and by car, officers followed the appellants' vehicle for its brief trip down Madison Avenue until the appellants struck a parked automobile. Immediately thereafter, Deputy Sheriff Velasquez observed the appellant Albert Agobian throw a cellophane bindle out the passenger window of the appellants' vehicle. [R. T. 168.] The contents of the bindle were analyzed and found to be heroin. [R. T. 15, 143, 190.]

Although the appellant Albert Egishian resisted arrest, he was finally taken into custody. [R. T. 108, 120, 124, 127-128.]

In searching the person of the appellant Albert Agobian after arrest, an amphetamine tablet and a seconal tablet were recovered from his left front shirt pocket. The appellant Agobian denied any knowledge of these tablets. [R. T. 181-183.]

The appellants were interviewed by the officers. Each appellant falsely denied seeing Ronald Rojas on March 28, 1962. [R. T. 114, 217-219.]

IV.

ARGUMENT.

A. 21 U. S. C. 174 Is Constitutional.

Appellants contend Section 174 of Title 21, United States Code, with its presumption, is unconstitutional as being violative of the Fifth Amendment to the Constitution of the United States. Sections 174 and 176(a) of the Narcotics Import and Export Act contain a substantially identical presumption; and, its constitutionality has been repeatedly upheld by the Supreme Court of the United States and by the Court of Appeals of this Circuit.

Yee Hem v. United States, 268 U. S. 178 (1925);

Hooper v. United States, 16 F. 2d 868 (9 Cir. 1926);

Bradford v. United States, 271 F. 2d 58 (9 Cir. 1959);

Butler v. United States, 273 F. 2d 436 (9 Cir. 1959);

Cellino v. United States, 276 F. 2d 941 (9 Cir. 1960);

Cutchlow v. United States, 301 F. 2d 295 (9 Cir. 1962);

White v. United States, 315 F. 2d 113 (9 Cir. 1963).

The constitutionality of the presumption sections has also been challenged on the ground that said provisions compel an accused to be a witness against himself. As was stated by this court in *Rosenberg v. United States,* 13 F. 2d 369 (9 Cir. 1926), at page 370:

"In no way is there compulsion that defendant shall testify. He may produce witnesses who may truthfully and without difficulty satisfy the jury that his possession was had in an honest and legitimate way. He may rely upon circumstances developed by the evidence of the prosecution as negativing unlawful possession, or he may himself testify and explain how he became possessed of the drugs."

The presumption is not unconstitutional as forcing a defendant to testify.

Yee Hem v. United States, 268 U. S. 178 (1925);

Ng Choy Fong v. United States, 245 Fed. 305 (9 Cir. 1917), cert. den. 245 U. S. 669;

Mullaney v. United States, 82 F. 2d 638 (9 Cir. 1936);

Dear Check Quong v. United States, 160 F. 2d 251 (D. C. Cir. 1947);

Caudillo v. United States, 253 F. 2d 513 (9 Cir. 1958).

B. The Evidence Is Sufficient to Sustain the Conviction.

The Government respectfully submits that the evidence is sufficient to sustain the jury's verdict. Especially is this true when this Court, as it must, considers the evidence and inferences that can be drawn from it most favorably to the Government.

Glasser v. United States, 315 U. S. 60 (1941);

Sandez v. United States, 239 F. 2d 239 (9 Cir. 1956);

Robinson v. United States, 262 F. 2d 645 (9 Cir. 1959);

Benchwick v. United States, 297 F. 2d 330 (9 Cir. 1961);

Young v. United States, 298 F. 2d 108 (9 Cir. 1962);

Debardeleben v. United States, 307 F. 2d 362 (9 Cir. 1962).

Several officers testified that Mr. Ronald Rojas was a special employee of the government. The officers further testified that past experience had proven Mr. Rojas was reliable. [R. T. 61, 66, 103.]

The testimony concerning the handling of heroin on the evening of March 27, 1962, clearly proved that the appellants intended to possess and continue dealing in the illicit traffic of narcotics. It is incongruous to permit the appellants to defend on the ground that the substance which they handled on March 27, 1962 was not proved to be heroin.

Britton v. United States, 60 F. 2d 772 (7 Cir. 1932).

"We note that by the specific language of Section 174 Defendant must be '*shown to have or to have had* possession of the narcotic drug.' (emphasis added.)"

Rodella v. United States, 286 F. 2d 306, 310-311 (9 Cir. 1960).

Mr. Rojas testified that on March 28, 1962, the appellants were going to deliver heroin. At the appointed date and location the appellants arrived.

During the attempt by the appellants to escape, an object was thrown from the appellants' moving vehicle

and the sound of glass breaking was heard. At this precise location, heroin was scraped from the asphalt pavement. Broken glass and a metal jar lid containing heroin were also recovered. That this heroin was in fact thrown from the appellants' vehicle is substantiated by the testimony of Deputy Sheriff Velasquez that no other broken glass was found along the route of the appellants' attempted escape. Nor were there any broken windows in the appellants' vehicle. The only rational conclusion that can be drawn from these facts is that the heroin recovered on March 28, 1962 is the same heroin which was "cut" by the appellants and stored in a glass jar with a metal lid on the evening of March 27, 1962.

> "When at the approach of the officers the jar containing the heroin was thrown out of the window of appellant's residence it was shown that a moment earlier someone had had possession of narcotics. In the absence of explanation showing the possession to be lawful it was presumed unlawful under 21 U.S.C.A. Section 174. That the corpus delicti of the offense charged was fully established . . ."
>
> *Cutchlow v. United States,* 301 F. 2d 295, 297 (9 Cir. 1962).

Appellee submits that this evidence standing alone would sustain the conviction. But in addition, there is the irrefutable evidence that after the appellants' vehicle struck a parked automobile, an officer observed the appellant Albert Agobian throw away a bindle of heroin.

Since reasonable minds as triers of the fact, could find that the evidence excludes every reasonable hypoth-

esis but that of guilt, appellee submits that the verdict of the jury must be sustained.

Remmer v. United States, 205 F. 2d 277 (9 Cir. 1953);

Bolen v. United States, 303 F. 2d 870 (9 Cir. 1962);

Farrell, et al. v. United States, ... F. 2d ....., No. 18,241 (9th Cir. Aug. 7, 1963).

V.

CONCLUSION.

For the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with these rules.

Jo Ann I. Dunne,
Assistant U. S. Attorney.